fact that QC and QCC are already implementing Section 272's requirements despite the fact that the requirements do not yet apply.

A. Qwest Will Comply with Each of the Requirements of Section 272

1. QCC Is a Separate Affiliate as Required by Section 272(a)

The BOC, QC, and its 272 affiliate, QCC, satisfy the Section 272(a) requirement that a BOC may not provide in-region interLATA services except through an affiliate that both is "separate" from the BOC and meets the requirements of Section 272(b). QCC is a separate affiliate. Brunsting Decl. ¶ 21. Both QC and QCC are wholly owned indirect subsidiaries of Qwest Communications International Inc. Neither QCC nor QC owns any stock in the other. Brunsting Decl. ¶ 21.

2. QC and QCC Will Comply with the Structural and Transactional Requirements of Section 272(b)

QCC will be operated as an independent carrier and will conduct business with QC on an arm's-length basis. Accordingly, the 272 Affiliate complies with the five requirements of Section 272(b):

272(b)(1): QCC will operate independently from QC. QCC does not and will not own any domestic transmission or switching facilities — or the land and buildings where they are located — jointly with QC. Likewise, QCC has not engaged and will not engage in any operation, installation, or maintenance services with respect to facilities owned by QC. Finally, QCC will operate, install, and maintain its own network, either directly or by contracting with third parties that are not affiliated with QC. Brunsting Decl. ¶¶ 27-28; Schwartz Decl. ¶¶ 39-42.

272(b)(2): QC and QCC maintain separate books, records, and accounts in accordance with Generally Accepted Accounting Principles (GAAP). QCC has established and maintains a chart of accounts that is separate from QC's. QCC maintains expenditure controls to ensure that funds are expensed and accounted for properly. Brunsting Decl. ¶¶ 29a-j; Schwartz Decl. ¶¶ 43-51.

272(b)(3): QC and QCC have separate officers, directors, and employees. In the Bell Atlantic–New York and SBC-Texas orders, the Commission found that a comparison of the BOC and the Section 272 affiliate's officer and director lists and payrolls was sufficient to show compliance with Section 272(b)(3). *New York 271 Order*, 15 FCC Rcd at 4155, ¶ 409; *Texas 271 Order*, 15 FCC Rcd at 18551, ¶ 401. The Commission has also specifically rejected contentions that a BOC must provide detailed information regarding reporting relationships. *See Second Louisiana 271 Order*, 13 FCC Rcd at 20789-90, ¶ 330. QC and QCC also have extensive controls to govern sharing of services to ensure that the companies operate independently and that confidential information is not shared between them. QC and QCC also have a policy prohibiting any loaning of an employee between QC and QCC. Brunsting Decl. ¶¶ 30-32; Schwartz Decl. ¶¶ 52-58.

272(b)(4): QCC will not obtain credit under any arrangement that would permit a creditor to have recourse to the assets of QC. Brunsting Decl. ¶¶ 33-36; Schwartz Decl. ¶¶ 59-62.

272(b)(5): QC and QCC will conduct all transactions with each other on an arm's-length basis, in accordance with this Commission's accounting rules, and will reduce all transactions to writing and make them available for public inspection. Procedures are in place to ensure that all Section 272 transactions comply with the Commission's affiliate-transaction rules; that they are reduced to writing, certified by an officer, and made available for public inspection at QC's headquarters; and that they are recorded at rates that comply with the Commission's rules. All goods, services, facilities and information provided by QC to QCC will be made available to other unaffiliated IXCs at the same rates, terms and conditions. Brunsting Decl. ¶¶ 37-47; Schwartz Decl. ¶¶ 63-77.

3. QC Will Comply with the Nondiscrimination Safeguards of Section 272(c)

As required by Section 272(c)(1), QC will not discriminate between QCC and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. Like any other IXC, QCC must contact an account representative at QC to obtain goods, services, facilities and information. QC has established a Compliance Oversight Team and a rigorous review process to ensure that it satisfies the requirement to provide services to its 272 affiliate on a nondiscriminatory basis. This process also ensures that all goods, services, facilities and information provided by QC to QCC are reduced to writing, disclosed and made available to unaffiliated entities, and priced according to the requirements of Section 272(b)(5). Schwartz Decl. ¶¶ 78-79, 81-83.

In addition, the BOC will not discriminate in favor of its Section 272 affiliate with respect to the *procurement* of goods, services, facilities, and information. QC and its affiliates adhere to a procurement policy that requires selection of suppliers of products and services without discrimination, based upon the best combination of total cost, quality, service, and availability. Schwartz Decl. ¶ 80.

As required by section 272(c)(2), QC will account for all transactions with QCC in accordance with the Commission's cost-allocation and affiliate-transaction rules. The Joint Cost Audit, annual SEC Form 10-K, and Cost Allocation Manual filings provide assurances that Qwest will comply with all required accounting principles. Schwartz Decl. ¶¶ 84-86.

4. Qwest Will Comply with the Audit Requirements of Section 272(d).

The BOC will obtain and pay for an independent auditor to conduct a joint Federal/State audit every two years in accordance with section 272(d) and the Commission's rules. A joint Federal/State biennial audit oversight team will determine the scope of each audit. The auditor will have access to the financial accounts and records of QC and QCC to verify that all transactions conducted between them were appropriate under the requirements of Section 272. The FCC will be given access to the working papers and supporting materials of the independent auditor, with appropriate protection for proprietary information. Schwartz Decl. ¶¶ 88-91.

5. Qwest Will Fulfill All Requests in Accordance with Section 272(e)

Qwest will comply with the provisions of Section 272(e). QC will not discriminate in favor of QCC with respect to requests for exchange and exchange-access services. QC's response time for requests for telephone exchange service and exchange access from unaffiliated entities will be no longer than its response times with respect to itself or its affiliates, *see* 47 U.S.C. § 272(e)(1); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22019, ¶ 240, and it will provide goods, services, facilities and information concerning its provision of exchange access on a nondiscriminatory basis, *see* 47 U.S.C. § 272(e)(2). QCC will obtain such services from QC under the same tariffed terms and conditions as are available to unaffiliated IXCs. QC will thus charge QCC an amount "no less than the amount charged to any unaffiliated interexchange carriers for such service," as required by Section 272(e)(3). QC's sales representatives will process orders in a nondiscriminatory manner. To the extent that QC provides interLATA or intraLATA goods, facilities, information or services to QCC, they will be provided "at the same rates and on the same terms and conditions," *see* 47 U.S.C. § 272(e)(4), as are made available to all carriers. Schwartz Decl. ¶¶ 93-94.

QC will maintain, update, and make available data on provisioning telephone exchange services and exchange access to QCC. This performance data will be reported monthly, and the results will be posted on the Internet. Schwartz Decl. ¶ 94.

6. Qwest and Its Affiliates Will Comply with the Joint Marketing Provisions of Section 272(g)

QCC will not market or sell QC's local exchange services except to the extent that QC permits other entities offering the same or similar service to do the same. *See* 47 U.S.C. § 272(g)(1). QC will not market or sell QCC's interLATA service originating in an in-region state unless and until the FCC has granted Section 271 authority for that state. *See* 47 U.S.C. § 272(g)(2). Brunsting Decl. ¶¶ 48-54; Schwartz Decl. ¶¶ 95-98.

7. QC's and QCC's Education and Training Efforts Will Ensure Satisfaction of Their Obligations Under Section 272

The Declarations of Marie Schwartz and Judith Brunsting describe the ongoing, comprehensive, and targeted training programs that will ensure that employees of QC and QCC (as well as other Qwest companies) understand and strictly observe the requirements of Section 272. Schwartz Decl. ¶¶ 99-108; Brunsting Decl. ¶¶ 55-57.

B. The Results of an Examination Conducted by KPMG LLP Confirm that Qwest's Provisioning of InterLATA Services Will Comply with Section 272

A recent examination of Qwest's Section 272 compliance by KPMG LLP found virtually no substantial errors. *See* Schwartz Decl. Exhibit MES-272-3. The few discrepancies found were not competition-affecting. In any event, QC and QCC have strengthened their controls that are designed to prevent similar discrepancies. As a result, the Commission can be even more certain that Qwest is ready to comply with Section 272 upon grant of this application.

In accordance with a recommendation by the Multistate Facilitator , QC engaged KPMG LLP to conduct an independent examination of transactions that occurred between the

BOC and the 272 affiliate during the period April through August 2001. KPMG LLP concluded that, except as noted in its report, QC and QCC had complied "in all material respects" with Sections 272(b)(2), 272(b)(5), and 272(c)(2), and applicable FCC rules and regulations governing accounting for their transactions with each other. 106/ KPMG LLP's report also served to confirm that QC's and QCC's internal controls had successfully identified untimely accruals and billings or recording of transactions in the course of the transition to QCC.

KPMG LLP's report identified only twelve discrepancies, all but one of which had been previously identified by Qwest and all of which have been corrected. Schwartz Decl. ¶ 25. Furthermore, the net financial impact of the discrepancies was actually to *disadvantage* QCC. Thus, those discrepancies did not reflect upon either of the principal issues that Section 272 is designed to address — "improper cost allocation and cross-subsidization between the BOC and its Section 272 affiliate" and "discriminat[ion] in favor of . . . Section 272 affiliates." 107/ Nor did they reflect any "systemic flaws" 108/ in QC's or QCC's Section 272 controls, since virtually all of those transactions had been initiated prior to the efforts undertaken to transition to QCC as the 272 affiliate as of March 2001.

Qwest and QCC used the results of this unprecedented examination to strengthen their Section 272 controls. Qwest then engaged KPMG LLP to perform yet another review to verify that each of the discrepancies identified in its report had been corrected and to verify that the supplemental controls had been put into place. That review confirmed that all such steps had

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106/ *See* Report of Independent Public Accountants, Attestation Examination with Respect to Report of Management on Compliance with Applicable Requirements of Section 272 of the Telecommunications Act of 1996, at 4 (included in Schwartz Decl., Exh. MES-272-3).

107/ *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20780 ¶ 122.

108/ *New York 271 Order*, 15 FCC Rcd at 4157, ¶ 412.

been taken and that "the new controls and enhancements implemented by Qwest appear to strengthen the overall control environment with respect to Section 272 compliance." *See* Schwartz Decl. Exh. MES-272-4.

KPMG LLP's report and the results of the follow-up examination therefore further support a Commission finding that Qwest will provide services in compliance with Section 272.

VI. GRANT OF QWEST'S APPLICATION WILL PROMOTE COMPETITION IN BOTH THE LOCAL EXCHANGE AND INTEREXCHANGE MARKETS AND WILL SERVE THE PUBLIC INTEREST

Qwest has opened its local exchange market in Colorado, Idaho, Iowa, Nebraska and North Dakota and has provided adequate assurances that the markets will remain open in the future, making the grant of its application "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). In conducting its public interest inquiry, the Commission has focused on three specific areas. First, the Commission examines whether grant of an application would be "consistent with promoting competition in the local and long distance telecommunications markets," giving substantial weight to Congress's presumption that long-distance entry would benefit consumers so long as the local market is open, in compliance with the competitive checklist. 109/ Second, the Commission seeks assurances that the RBOC will continue to meet its Section 271 obligations after a Section 271 application is granted. 110/ In this analysis, the Commission reviews performance assurance plans and other available enforcement tools. Finally, the Commission considers whether there are any remaining "unusual

109/ *Kansas/Oklahoma 271 Order,* 16 FCC Rcd at 6375-76, ¶ 268.

110/ *Id.* at 6376, ¶ 269.

circumstances that would make entry contrary to the public interest under the particular circumstances of these applications." 111/

A. Grant of Qwest's Application is Consistent with Promoting Competition in Both the Local and Long Distance Markets

1. Competition Has Come to Colorado, Idaho, Iowa, Nebraska and North Dakota

In evaluating previously-filed Section 271 applications, the Commission has emphasized that "compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest." *New York 271 Order*, 15 FCC Rcd at 4161 ¶ 422; *see also Texas 271 Order*, 15 FCC Rcd at 18557-58 ¶ 416. Indeed, checklist compliance by definition signals that "barriers to competitive entry in the local market have been removed and [that] the local exchange market is open to competition." *New York Order,* 15 FCC Rcd at 4162-63 ¶ 426. Here, as the State Authorities have found and, as demonstrated above, Qwest has satisfied the checklist in each of Colorado, Idaho, Iowa, Nebraska and North Dakota.

Local markets in the application states are open and thriving. Residents of these states are benefiting from extensive competition from all types of competitors using all three entry modalities provided under the Act. Moreover, as post-entry developments in other states make clear, Qwest's entry into the long distance market will prompt still further *local* competition by stimulating the local-market activities of the established IXCs.

As the Commission has held on numerous occasions, there is no CLEC market share test in the public interest inquiry or anywhere else in Section 271. 112/ Nevertheless,

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111/ *Id.* at 6375, ¶ 267; *see also id.* at 6381-82, ¶¶ 281-82.

112/ *New York 271 Order*, 15 FCC Rcd at 4163 ¶ 427; ; *Pennsylvania 271 Order*, 16 FCC Rcd at 17487 ¶ 126; *Massachusetts 271 Order*, 16 FCC Rcd at 9118-19 ¶ 235; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268; *Texas 271 Order*, 15 FCC Rcd at 18558-59 ¶ 419.

CLECs have captured a significant share of the market in each of the application states. *See* Teitzel Decl. at notes 67-70 and accompanying charts. Qwest estimates CLEC market share in each state, as of March 31, 2002, as follows: Colorado – between 20.5 and 21.4 percent; Idaho – between 8.8 and 10.6 percent; Iowa – between 17.8 and 18.4 percent; Nebraska – between 21.5 and 29.9 percent; and North Dakota – between 16.0 and 21.0 percent. *Id.*

Because these estimates were calculated, in part, using the same methodology used by SBC, they can be compared to the market shares that existed in Texas, Kansas, and Oklahoma when the FCC granted SBC's Section 271 applications for those states. In all but one of the application states, there has been significantly greater entry than existed in Oklahoma (estimated at 5.5 to 9.0 percent) and Kansas (estimated at 9.0 to 12.6 percent) when SBC's application for those states was filed. *See Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6240, ¶¶ 4-5. Indeed, CLEC market shares in each of the application states actually exceed the market shares that existed in Texas (8.0 percent) 113/ — even though each of the application states is far less populous than Texas. *See* Teitzel Decl. at note 73.

The fact that facilities-based competition is well-established in the application states is especially significant. The Commission has observed that "[t]he construction of new local exchange networks" benefits consumers because facilities-based carriers "can exercise greater control over their networks, thereby promoting the availability of new products that differentiate their services in terms of price and quality." *UNE Remand Order* 15 FCC Rcd at 3749, ¶ 110.

113/ *See Texas 271 Order*, 15 FCC Rcd at 18358, ¶ 5 & n.7.

2. The Experience of Post-Grant States Demonstrates that Competition in Colorado, Idaho, Iowa, Nebraska and North Dakota Will Only Intensify Following Grant of Qwest's Application.

The benefits of in-region, interLATA entry by the BOCs already have been established by the experience of BOCs in other states and independent studies continue to confirm that the benefits to consumers of BOC entry into the long distance market are substantial. A May 2001 study by the Telecommunications Research Action Center ("TRAC") demonstrates that New York consumers will save up to $284 million annually on long distance telephone service as a result of BOC entry into the interLATA market in that state. 114/ There is every reason to believe that consumers in the application states will experience similar benefits and savings if Qwest is allowed to offer interLATA long distance services.

Permitting Qwest to enter the long distance market would increase customer choice and competition in the *local* market as well. Experience has shown that a BOC's imminent entry into the long distance market acts as a catalyst for CLECs to accelerate entry into local exchange markets. In particular, IXCs faced with the prospect of increased competition for their core long distance customers accelerate their local entry plans in an effort to retain those customers through bundled service packages. The data from New York bear this out. CLECs put their local entry plans into gear only once it became clear that Verizon's Section 271 application would succeed. In the News Release announcing the Commission report entitled *Local Telephone Competition: Status as of January 31, 2000*, released May 21, 2001, the Commission concluded:

> CLECs captured 20% of the market in the State of New York — the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2

114/ *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001. http://trac.policy.net/proactive/newsroom/release.vtml?id=18740.

> million lines the prior year — an increase of over 130% from the time the FCC granted Verizon's long distance application in New York in January 1999 to January 2000.

News Release, *Federal Communications Commission Releases Latest Data on Local Telephone Competition*, Federal Communications Commission, May 21, 2001. Meanwhile, in its most recent report on Local Telephone Competition, released February 27, 2002, the Commission reported that the CLEC access line total in New York had grown to 3.2 million lines, representing an increase in the CLEC market share to 23%. *See Federal Communications Commission*, Local Telephone Competition: Status as of June 30, 2001 (released Feb. 27, 2002).

Furthermore, data recently released by the New York State Public Service Commission reveal that the number of local exchange lines served by CLECs more than doubled from 1999 to 2000 (from 9.8 to 20.9 percent) following the grant of Verizon's Section 271 application; and, for the first time since the New York PSC began collecting these statistics, more CLEC access lines were dedicated to residential customers (52 percent) than to business customers (48 percent). 115/ In total, New York consumers will save an estimated $700 million annually on long distance and local telephone service. 116/

Similarly impressive statistics have been reported for Texas, where "CLECs have captured 12% of the market in Texas, gaining 644,980 end-user lines in the 6 months after the FCC granted SBC's Section 271 application — an increase of over 60% in customer lines since June 2000." *See* News Release, *Federal Communications Commission Releases Latest Data on*

115/ *See* New York State Public Service Commission, *Analysis of Local Exchange Service Competition in New York State Reflecting Company Reported Data and Statistics as of December 31, 2000* at 3, 4. http://www.dps.state.ny.us/telecom/telanalysis.htm.

116/ *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001; http://trac.policy.net/proactive/newsroom/release.vtml?id=18740.

Local Telephone Competition, Federal Communications Commission, May 21, 2001. The Commission's February 27, 2002 report shows a further increase in CLEC market share in Texas to 14%. *See Federal Communications Commission*, Local Telephone Competition: Status as of June 30, 2001 (released Feb. 27, 2002). Permitting Qwest to enter the interLATA market should have a similar effect in Colorado, Idaho, Iowa, Nebraska and North Dakota, enabling customers to obtain expanded benefits of local competition.

Conversely, if Qwest is not afforded an opportunity to become a full service in-region competitor, there is a risk that customers will have a narrower range of service options, particularly in less competitive geographically rural areas. Local exchange carriers that want to be healthy, viable companies, need to offer what customers want: attractive packaging of local service, intraLATA long distance and interLATA long distance, calling features, data services, Internet connectivity, and other choices. *See Qwest, Consumers and Long Distance Entry: A Discussion Paper* ("*Binz Study*"), attached as Exh. DLT-Track A/PI-GEN-2 to Teitzel Decl. Qwest's competitors can do that today and have chosen to do so only in certain markets.

The evolving markets in the application states, and the dynamic telecommunications marketplace in post-grant states, dramatize the benefits to the public that will result from permitting Qwest to provide in-region, interLATA telecommunications services in Colorado, Idaho, Iowa, Nebraska and North Dakota.

B. Qwest Has Provided Adequate Assurances That The Local Exchange Market Will Remain Open to Competition After Section 271 Approval.

1. Qwest Is Subject to Comprehensive Performance Reporting and Assurance Mechanisms.

Although the Commission has "never required" adoption of a performance assurance plan, the Commission has stated that implementation of such a plan constitutes "probative evidence" that an applicant will continue to meet its Section 271 obligations, and that its long distance entry is consistent with the public interest. 117/

In prior Section 271 cases, the Commission has sought to determine whether a proposed performance assurance plan "fall[s] within a zone of reasonableness" and is "likely to provide incentives that are sufficient to foster post-entry checklist compliance." 118/ To guide this analysis, the Commission has identified five key characteristics of an acceptable plan: (a) potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; (b) clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; (c) a reasonable structure that is designed to detect and sanction poor performance when it occurs; (d) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and (e) reasonable assurances that the reported data are accurate. 119/ The performance assurance plans entered into by Qwest in the application states satisfy each of these criteria.

Qwest proposes to implement a comprehensive set of performance measures and enforcement mechanisms called, in Colorado, the "CPAP;" and collectively referred to in Idaho, Iowa, Nebraska and North Dakota as the "QPAP." 120/ To reduce duplication and controversy,

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117/ *New York 271 Order*, 15 FCC Rcd at 4164-65 ¶ 429 ("Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval."); *Texas 271 Order*, 15 FCC Rcd at 18559-60 ¶ 420.

118/ *New York 271 Order* at ¶ 433.

119/ *See id.*

120/ As discussed above at Section I(B) and in the Reyolds QPAP Declaration, the latter four states participated in a collaborative PAP process conducted under the auspices of the ROC. The CPUC developed its plan independently. *See generally* Declaration of Mark S. Reynolds, Colorado Performance Assurance Plan ("Reynholds CPAP Decl."), Att. 5, App. A.

the CPAP and QPAP are built around the same key measures as other plans previously approved by this Commission. It has been enhanced through a collaborative process by the State Authorities and CLECs operating in the application states. Both the CPAP and the QPAP embody the cumulative experience of prior Section 271 applications and the requirements of in-region CLECs. Accordingly, as shown below, the plans satisfy the Commission's requirements that post-entry performance assurance plans include:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
- reasonable assurances that the data reported are accurate.

New York 271 Order at ¶ 433.

a) The relationship of the CPAP and the QPAP to CLEC entry into the local exchange market

The CPAP and QPAP assemble performance measures into nine modules that take into account each of the entry strategies of competitors in the local exchange market; resellers, facilities-based providers, and UNE-based entrants. The modules are (1) Electronic Gateway Availability; (2) Preordering; (3) Ordering; (4) Provisioning; (5) Maintenance and Repair; (6) Billing; (7) Network Performance; and (8) Collocation; and (9) Change Management. Each module includes a series of performance measures that provides a measure of the quality of service provided to CLECs in the aggregate, as well as to individual CLECs.

Performance measurements in each of these functional areas may include multiple sub-measurements covering different sub-processes, different wholesale services, and several geographic disaggregations (*e.g.*, dispatches within an MSA vs. dispatches outside an MSA; urban zone '1' vs. rural zone '2').

b) Financial incentives for post-entry compliance.

While modeled on that of the SBC-Texas performance assurance plan approved by the Commission, the payment structure of the Qwest plans contains significant enhancements. The result is a structure that meets and in many cases exceeds the payment structure the Commission has approved in prior Section 271 proceedings. There is, therefore, no question that each state's payment structure and criteria are reasonably designed to detect and sanction poor performance, if and when it should occur.

Like the SBC-Texas plan, the Qwest plans operate at two levels. Tier 1 applies at the individual CLEC level and provides for compensatory payments to CLECs. These payments are self-executing: they are made to each CLEC each month whenever the standard is not met (for parity measurements by any amount that is statistically significant), regardless of whether the CLEC has suffered any damages resulting from the missed measurement. Tier 2 payments are calculated at the aggregate CLEC level and provide additional financial incentive payments and are made to a designated state fund or the state general fund.

The Commission has required plans to place sufficient BOC local revenues at risk to ensure that the applicant's commitment to meeting the performance criteria contained in the plan is acceptable. Prior plans have varied in their design in this respect. However, the Commission has held that, where a plan annually places at risk at least 36% of the applicant's net return as calculated from ARMIS data, 121/ it provides a meaningful and significant incentive to refrain from anticompetitive behavior. 122/ In each of the application states, Qwest's PAP places at least 36% of Qwest's net return at risk every year. In Colorado, the CPUC may raise the cap or take other action if payments reach the cap two years in a row or reach one-third of the cap in a two consecutive month period. In Idaho and North Dakota the 36% cap may be increased to 44% (and in Iowa, decreased to 30%), upon specific State Authority findings. The Nebraska and Iowa QPAPs have "procedural" caps of 24%. Under these plans, Qwest is exposed to a maximum liability of 44% of ARMIS Net Return. 123/ In Idaho and Iowa, the caps will be updated annually based on ARMIS data. In each instance, as the Commission's prior Section 271 decisions indicate, the magnitude of potential liability provides adequate incentive for Qwest to maintain the requisite wholesale performance standards after its section 271 application has been granted.

121/ ARMIS data "represents total operating revenue [from local service] less operating expenses and operating taxes" and is provided to the FCC on an annual basis. The Commission has found that a calculation of "net return" based upon this data was a "reasonable approximation of total profits derived from local exchange service." *New York 271 Order* at 4168 (¶ 436); *Texas 271 Order* at 18561-62 (¶ 424).

122/ *See New York 271 Order* at 4167-68 (¶ 435 & n.1332); *Texas 271 Order* at 18561-62 (¶ 424 & n.1235); *Kansas/Oklahoma 271 Order* at 6378-79 (¶ 274 & n.837). In New York, this amount was subsequently increased, but only following concerns arising after section 271 approval. *See Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan*, Case Nos. 97-C-0271, 99-C-0949 NY PSC (Nov. 3, 1999), available at http://www.dps.state.ny.us/fileroom/doc6721.pdf.

123/ For Colorado, 36% Net Return based upon 1999 ARMIS data is $100,000. For Idaho, 36% Net Return based upon 1999 ARMIS data is $13,000,000; 44% is $16,000,000. For Iowa, 36% Net Return based upon 1999 ARMIS data is $31,000,000; 44% is $38,000,000. For Nebraska, 36% Net Return based upon 1999 ARMIS data is $30,000,000; 44% is $37,000,000. For North Dakota, 36% Net Return based upon 1999 ARMIS data is $13,000,000; 44% is $16,000,000.

The CPAP and QPAP provide for self-executing payments for nonconforming service. *See New York 271 Order* at ¶ 441; *Texas 271 Order* at ¶ 427. They require automatic payments to CLECs and to the states based upon the performance results generated under the PID business rules under the applicable payment structure. Consequently, CLECs receive Tier 1 payments without any need to prove either that they were harmed by the non-conforming performance, or that they suffered damage in any particular amount. Likewise, each state (all or in part through a designated fund) receives Tier 2 payments whether or not competition has been harmed by the non-conforming performance. Qwest is obligated to provide CLECs and the states a monthly report of Qwest's performance for measurements contained in the plan.

We note also that the QPAP will not be the only safeguard against backsliding. The most significant assurance of future compliance beyond the QPAP is the Commission's enforcement authority under Section 271(d)(6). *See* 47 U.S.C. § 271(d)(6). *See also New York 271 Order*, 15 FCC Rcd at 4164-65 ¶ 429. Thus, there is more than adequate assurance that Qwest's market will remain open.

C. There Are No "Unusual Circumstances" That Would Make Long Distance Entry Contrary to the Public Interest.

In addition, the Commission has explained that it "may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest." *Texas 271 Order*, 15 FCC Rcd at 18558, ¶ 417. The record demonstrates that no such "unusual" circumstances exist in any of the application states.

First, the local market in each of the application states is open and local competition is thriving. And, as reflected in the experience of the post-relief BOCs in other states, Qwest's entry into the long distance market in these states will further promote local competition.

Second, mechanisms are in place to ensure that the local market will remain open. As discussed above, the State Authorities have adopted strict performance standards, and have approved comprehensive performance assurance plans that mirror the plans adopted by other RBOCs and previously approved by this Commission.

Meanwhile, and as discussed above, the State Authorities have set TELRIC rates for unbundled network elements. There is no basis under the "public interest" test of Section 271(d)(3)(C) for imposing an independent requirement that the BOC provide still lower rates in order to afford CLECs even greater incentives to enter the market by means of the UNE platform.

Qwest anticipates, however, that AT&T and others will raise in this proceeding the same "price squeeze" argument that they have unsuccessfully raised in every recent Section 271 proceeding, relying once more on the D.C. Circuit's opinion in *Sprint Communications Co., L.P. v. FCC*, 274 F.3d 549 (D.C. Cir.2002). But that argument will have no greater merit here than in the *Vermont* or *Georgia/Louisiana* proceedings, in which the Commission rejected it on expansive grounds. 124/

124/ *Vermont 271 Order,* ¶¶ 65-73; *Georgia/Louisiana 271 Order,* ¶¶ 283-90. The term "price squeeze" is a misnomer in this context, because a true price squeeze, in the antitrust sense, can arise only where a firm charges more than a "fair price" for an essential input. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 437-38 (2d Cir. 1945)). As an initial matter, ILECs can hardly be said to sell their UNEs at "unfair" prices, because those prices are regulated, *see id.* at 25-29, and indeed are based on TELRIC, an explicitly pro-competition forward-looking cost methodology. Just as important, the UNE-Platform *per se* is not remotely an essential input for CLEC market entry, because CLECs may alternatively enter either through resale or through the deployment of their own alternative facilities, whether or not combined with individual ILEC UNEs. For that reason among others, the Commission has properly rejected AT&T's misplaced reliance on *FPC v. Conway*, 426 U.S. 271 (1976). *See Vermont 271 Order*, ¶ 67.

As an initial matter, the D.C. Circuit did not endorse AT&T's price squeeze claim on the merits, as the Commission itself has recognized. 125/ To the contrary, the court left in place the order granting Section 271 authorization for Kansas and Oklahoma, expressed concern merely about what it perceived as the Commission's "brush-off" of AT&T's claim, and remanded to the Commission for a fuller explanation. *Sprint*, 274 F.3d at 554. It would make little sense for the Commission to deny this Section 271 application, even though Qwest has satisfied all of its obligations under the checklist to charge CLECs TELRIC-compliant rates for access to its UNEs, on the ground that either the "public interest" or the *Sprint* decision requires Qwest to lower its UNE rates still further in order to promote "the widest unbundling possible" – an objective that the D.C. Circuit itself recently disavowed. *United States Telecom Association v. FCC*, No. 00-1012, 2002 WL 1040574, *9 (D.C. Cir. May 24, 2002).

Moreover, the Commission made it clear in the *Vermont* and *Georgia/Louisiana* decisions that it "will look beyond a negative margin for the provision of residential services in high-cost areas using the UNE-Platform when examining allegations of price squeeze." *Vermont 271 Order*, ¶ 68; *Georgia/Louisiana 271 Order*, ¶ 286. The Commission recognized that states have a number of policy reasons for setting retail rate levels, and "it would not be in the public interest to deny a section 271 application simply because the local telephone rates are low." *Vermont 271 Order*, ¶ 68. Congress required *cost*-based rates for UNEs, and thereby made UNEs attractive to CLECs as an entry strategy mostly for customers that would otherwise pay rates that, in the aggregate, are *at or above cost*. Congress neither designed nor expected a cost-based platform to help CLECs recruit customers -- including many residential customers -- that

125/ *Vermont 271 Order*, ¶ 65; *Georgia/Louisiana 271 Order*, ¶ 283. *See also Colorado Pricing Reconsideration Order* at 19 ("The court did *not* hold that wholesale rates must be set to an ILEC serves at *below-cost* rates through various subsidy mechanisms. For such customers, Congress gave CLECs a separate entry option with a different pricing scheme: resale of an ILEC's retail services, for which CLECs pay a wholesale rate stepped down from the incumbent's retail rate, even where the ILEC's retail rate for particular customers is below cost. *See* 47 U.S.C. §§ 251(c)(4), 252(d)(3); *Vermont 271 Order*, ¶ 69; *Georgia/Louisiana 271 Order*, ¶ 287. 126/

In any case, while there is no legal merit to the CLECs' "price squeeze" claim on *any* set of facts, the facts here would render any such claim unsupportable even if that were not the case. Competition is thriving in the application states. Accordingly – and particularly in light of the resale option -- there is no basis for any contention that the "UNE pricing selected here [has] doomed competitors to failure." 127/ Moreover, even taken in isolation, Qwest's UNE rates, when compared to the revenue that CLECs can reasonably expect to receive from purchasing those UNEs, independently demonstrate that CLECs have the opportunity to compete successfully using the UNE-P or other UNE-based configurations in the states covered by this application states. 128/ In this regard, after conducting a thorough analysis of record evidence

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ensure that competition will flourish (*i.e.* that CLECs are ensured a profit when entering the local market).") (emphasis in original).

126/ In fact, because Section 271(d)(4) bars the FCC from "extend[ing] the terms used in the competitive checklist," the Commission could not (even if it wished to) lawfully construe the "public interest" standard to impose new "top-down," margin-related pricing requirements *for UNEs* instead of, or in addition to, the "bottom-up" cost standard prescribed by Section 252(d)(1) and incorporated by reference in the checklist.

127/ *Sprint Communications Co. v. FCC*, 274 F.3d at 554.

128/ Any meaningful margin analysis must consider all the revenue a CLEC receives as a result of serving a customer through UNEs, compared against the cost of doing so. The analysis thus must take into account not only basic exchange retail rates ("1FRs" in the case of residential customers), but also any additional revenues that the CLEC would earn from providing other services as well, such as vertical feature charges, intraLATA toll revenues, and the amounts the presented on this point, the CPUC "reject[ed] the notion that our adopted rates will likely lead to a price squeeze and will not enable CLECs to enter the local exchange market through the purchase of UNEs from Qwest." *Colorado Pricing Reconsideration Order* at 22.

Finally, there is no basis for any allegation that Qwest's interstate access rates would somehow subject unaffiliated IXCs to a "price squeeze" in the *interLATA* market. The Commission has repeatedly rejected this claim on the merits, 129/ and it has separately made clear that access charge reform – much of which has already been completed in any event 130/ – is *not* a prerequisite to Section 271 approval. 131/

CLEC would receive (or avoid paying) in interstate and intrastate access charges for originating and terminating long-distance minutes. As discussed in the attached Declarations of Jerrold Thompson for Colorado, Idaho, Iowa, Nebraska, and North Dakota, such comparisons confirm that the TELRIC-compliant rates in these states provide CLECs with widespread opportunities to compete using the platform. Moreover, these comparisons are conservative in approach because they focus exclusively on serving residential customers; in reality, CLECs also serve business customers, from whom they earn higher margins.

129/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd. 9587, 9597-98, ¶ 20 (2000); *accord Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 548 (8th Cir. 1998) (rejecting same "price squeeze" argument), *affirming Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16101-04 ¶¶ 277-82 (1997); *see also Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order, 12 FCC Rcd 15756, 15811-12 ¶ 97 (1997).

130/ *See, e.g., Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000), *aff'd in pertinent part, Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001).

131/ *See, e.g., Supplemental Order Clarification*, 15 FCC Rcd. at 9598, ¶ 19 ("Congress anticipated that some [BOCs] would obtain authorization under 47 U.S.C. 271 to originate in-region long-distance services before the completion of access charge reform.").

CONCLUSION

The local exchange market in each of the application states is demonstrably open to competition. Qwest has satisfied its statutory checklist obligations and otherwise complied with the requirements of the 1996 Act, and it will continue to do so in the future. Its entry into the interLATA market in each of Colorado, Idaho, Iowa, Nebraska and North Dakota will fulfill the promise of competition for all the residents of these states.

Accordingly, Qwest's Consolidated Application should be granted.

Respectfully submitted,

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June 13, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	**WC Docket No. ____________**
	)	
	)	
Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota	)	

GLOSSARY OF CITATIONS

Colorado PUC Hearing Commissioner 272 Decision	*Investigation Into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Hearing Commissioner Order on Staff Volume VII Regarding Section 272, the Public Interest, and Track A, Docket No. 97I-198T, Order No. R02-318-I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, March 15, 2002)
Colorado PUC Hearing Commissioner Compliance Decision	*Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Hearing Commissioner Order Regarding Qwest's Demonstration of Compliance with the Resolution of Impasse Issues Relating to Volumes IA, IIA, IIIA, IVA; Docket No. 97I-198T, Decision No. RO2-3-I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, Jan. 2, 2002)
Colorado PUC Hearing Commissioner Emerging Services Modification Decision	*Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Hearing Commissioner Order Regarding Motions to Modify Decision No. R01-1015, Decision No. R01-1094 (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, Oct. 26, 2001)
Colorado PUC Hearing Commissioner ICG Telecom Decision	*Petition of ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with US West Communications, Inc. pursuant to § 252(b) of the Telecommunications Act of 1996*, Initial Commission Decision, Docket No. 00B-103T, Decision No. C00-858 (Colo. Pub. Utils. Comm'n, Aug. 1, 2000)
Colorado PUC Hearing Commissioner Interim Procedural Order	*Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Interim Procedural Order, Docket No. 97I-198T, Decision No. R01-521-I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, May 15, 2001)
Colorado PUC Hearing Commissioner Intervenors' Motion Decision	*Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Order Regarding Joint Intervenors Motion to Modify Decision No. R01-651-I; Docket. No. 97I-198T, Decision No. R01-768-I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, July 24, 2001)

Colorado PUC Hearing Commissioner Level 3 Petition Decision	*Petition of Level 3 Communications LLC, for Arbitration pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, Decision No. C01-312 (Colo. Pub. Serv. Comm'n, March 30, 2001)
Colorado PUC Hearing Commissioner Modification Decision	*Investigation Into Qwest Communications, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996*, Order Regarding Motions to Modify Decision Nos. R01-846 and R01-848; Docket No. 97I-198T, Decision No. R01-990-I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, Sept. 27, 2001)
Colorado PUC Hearing Commissioner Decision Denying Motion to Modify Decision on Staff Volume VII	*Investigation Into Qwest Communications, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996*, Order Denying Motion to Modify Order on Staff Volume VII, Docket No. 97I-198T, Decision No. R02-516-I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, May 3, 2002)
Colorado PUC Hearing Commissioner Qwest SGAT Decision	*U S WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions*, Docket No. 99A-577T, Decision No. C99-1329 (Colo. Pub. Utils. Comm'n, Dec. 7, 1999)
Colorado PUC Hearing Commissioner Qwest SGAT II & OSS Request and Intervenors' Motions & Petitions Decision	*Investigation Into U S West Communications, Inc.'s Compliance with § 271 (c) of the Telecommunications Act of 1996*; Commission Order, Docket No. 97I-198T, Decision No. C00-420 (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner April 25, 2000)
Colorado PUC Hearing Commissioner Sprint Decision	*Petition of Sprint Communications Company, L.P., for Arbitration of an Interconnection Agreement with US West Communications, Inc. pursuant to § 252(b) of the Telecommunications Act of 1996;* Initial Commission Decision, Docket No. 00B-011T, Decision No. C00-479 (Colo. Pub. Utils. Comm'n, May 3, 2000)
Colorado PUC Hearing Commissioner Subloop Issues Decision	*Investigation Into Qwest Communications, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996*; Order Regarding Subloop Issues SB-16 and SB-21, Decision No. R01-1095I (Colo. Pub. Utils. Comm'n, Gifford, Hr'g Comm'ner, Oct. 26, 2001)